

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ABEL INVESTMENTS, LLC,)	
Petitioner,)	
v.)	PCB 2016-108
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

**MOTION FOR AUTHORIZATION OF PAYMENT OF
ATTORNEY'S FEES AS COSTS OF CORRECTIVE ACTION**

NOW COMES Petitioner, ABEL INVESTMENTS, LLC, by its undersigned counsel, and pursuant to Section 57.8(1) of the Illinois Environmental Protection Act (415 ILCS 5/57.8(1)), petitions the Illinois Pollution Control Board (hereinafter "the Board") for an order authorizing payment of legal costs, and in support thereof states as follows:

1. On December 15, 2016, the Board entered an interim opinion and order reversing the Agency's underlying decision in part, and affirming the decision in part with Petitioner to be given the opportunity to resubmit the consultant budgeting information with additional information. Abel Investments, PCB 16-108 (Dec. 15, 2016).

2. Furthermore, the Board directed Petitioner to file a statement of legal fees that may be eligible for reimbursement and arguments in favor of the Board exercise of its discretion to direct the Agency to award those fees. Id. at p. 12.

3. Attached hereto is the Affidavit of Patrick D. Shaw, documenting the legal costs in this matter, which are \$13,519.37. This affidavit is modeled on previous affidavits utilized by undersigned counsel and found to have been sufficient by the Board. E.g., Prime Location Properties v. IEPA, PCB No. 9-67, at p. 5 (Nov. 5, 2009). It sets forth the legal services

provided, the identity of the attorney providing the legal services, and itemization of the time expended for the individual service, and the hourly rate charged. Id.

4. The Board has previously recognized undersigned counsel's experience in underground storage tank appeals. Prime Location Properties v. IEPA, PCB No. 9-67, at p. 6 (Nov. 5, 2009). His billing rate is \$200 per hour, which is believed to be a reasonable rate for environmental attorneys who practice before the Board, and which has been the billing rate in previous attorney-fee awards. E.g., Knapp Oil v. IEPA, PCB No. 16-103, at p. 3 (Nov. 17, 2016)

5. All of the legal costs sought herein were incurred "seeking payment under Title XVI and the plain language of Section 57.8(l) of the Act allows for the awarding of legal fees." Illinois Ayers Oil Co. v. IEPA, PCB 03-214, at p. 8 (Aug 5, 2004). In Illinois Ayers, the Board found that since a budget is required as a precondition to obtaining payment, the attorney fee provision of Section 57.8(l) provides reimbursement for appeals from plans and budgets. Id.

6. The award of legal costs are discretionary with the Board. Ted Harrison Oil Co. v. IEPA, PCB 99-127 (Oct. 16, 2003). Historically, the Board has initially and fully considered the reasonableness of the claimed legal defense costs before exercising its discretion to authorize their payment. Evergreen FS, v. IEPA, PCB No. 11-51 (Sept. 6, 2012). In Illinois Ayers Co. V. IEPA, PCB 03-214 (Aug. 5, 2004), the petitioner urged the Board to follow federal precedents arising under public interest statutes, which assume that a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Hensley v. Eckerhart, 461 U.S. 424, 429 (1983). While the Board has made no express comment on this presumption, the Board has generally awarded litigation costs whenever the petitioner has prevailed. Knapp Oil Co. v. IEPA, PCB 2016-103 (Nov. 17, 2016); Burgess v.

IEPA, PCB 15-186, at p. 11 (Nov. 5, 2015); Estate of Gerald D. Slightom v. IEPA, PCB 2011-025 (Nov. 5, 2015); Chatham BP v. IEPA, PCB 15-173 (Sept. 3, 2015); McAfee v. IEPA, PCB 15-84 (May 21, 2015); Piasa Motor Fuels, Inc. v. IEPA, PCB 14-31 (Mar. 19, 2015); PAK-AGS v. IEPA, PCB 15-14 (March 5, 2015); Chatham BP v. IEPA, PCB 14-1 (Feb. 5, 2015); Wheeling/GWA Auto Shop v. IEPA, PCB 10-70 (Sept. 22, 2011); Evergreen FS v. IEPA, PCB 11-51 (Sept. 6, 2012); Zervos Three, v. IEPA, PCB 10-54 (June 2, 2011); Dickerson Petroleum v. IEPA, PCB 09-87 (Dec. 2, 2010); Prime Location Properties v. IEPA, PCB 9-67 (Nov. 5, 2009); Swif-T Food Mart v. IEPA, PCB No. (Aug. 19, 2004); Illinois Ayers Co. v. IEPA, PCB No. 03-214 (Aug 5, 2004); Ted Harrison Oil Co. v. IEPA, PCB 99-127 (Oct. 16, 2003).

7. In Illinois Ayers Co. v. IEPA, PCB No. 03-214 (Aug 5, 2004), the Board found that the owner/operator was a prevailing party, though the IEPA was affirmed on some issues, and awarded all \$44,456.49 of litigation costs. “A prevailing party, for purposes of awarding attorney fees, is one that is successful on a significant issue and achieves some benefit in bringing suit.” J.B. Esker & Sons v. Cle-Pa’s Partnership, 325 Ill. App. 3d 276, 280 (5th Dist. 2001); see also Community Consolidated School Dist. No 54 v. Illinois State Board of Educ., 216 Ill. App. 3d 90, 94 (1st Dist. 1991) (“To qualify as a prevailing party, a plaintiff must succeed in obtaining some relief from the defendant against whom attorney fees are sought”). The party need not necessarily succeed as to all issues. See Becovic v. City of Chicago, 296 Ill. App. 3d 236, 240 (1st Dist. 1998) (citing numerous cases in holding that party prevailed in obtaining \$2,750 judgment in suit seeking \$35,300); Ardt v. State, 292 Ill. App. 3d 1059, 1Q67 (1st Dist. 1997) (where issues were complex and inextricably intertwined, court would not engage in

proposed claim-chopping approach).

8. The Board has also considered whether the “case raised important issues regarding Agency determinations on reimbursement from the UST Fund.” PAK-AGS v. IEPA, PCB 15-14, at p. 7 (March 5, 2015). In the past year, the Agency under new management has initiated a series of policy changes, which some might call illegal rulemakings, that have raised and will continue to raise new issues about how the LUST Fund is supposed to be working. The Board’s ruling herein will aid in many pending disputes. Moreover, Petitioner considers the concession that it be “afforded the opportunity to resubmit” with the Board guidance as to what information would be useful as significant. (Board Order, at pp. 7-8) The Board has previously recognized that the adjudication of contested cases is an essential element in the formation of the policies that govern the UST reimbursement program. Platolene 500 v. IEPA, PCB 92-9, at 12-14 (May 7, 1992). In challenging the Agency’s decision, Petitioner has contributed to the body of law in which UST reimbursement decisions are based.

9. Accordingly, Petitioner asks the Board to exercise its discretion to award the legal defense costs incurred seeking payment for corrective action under Title XVI.

WHEREFORE, Petitioner, ABEL INVESTMENTS, LLC, requests that the Board authorize payment from the Leaking Underground Storage Tank Fund the amount of \$13,519.37 in attorney’s fees and litigation costs pursuant to 415 ILCS 5/57.8(l), and such other and further relief as the Board deems meet and just.

Respectfully submitted,

ABEL INVESTMENTS, LLC
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW
Its attorneys

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484

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v.)	PCB 2016-108
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PROTECTION AGENCY,)	
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STATE OF ILLINOIS)
) ss.
COUNTY OF SANGAMON)

**AFFIDAVIT OF PATRICK D. SHAW
VERIFYING ATTORNEY FEES**

Affiant, Patrick D. Shaw, being first duly sworn, states as follows:

1. The statements made herein are based upon my personal knowledge, and I am competent to testify hereto.

2. I am an attorney duly licensed to practice law in the State of Illinois; and I am the attorney of record for Petitioner in the case entitled Abel Investments, LLC v. IEPA, PCB 2016-108.

3. Attached hereto as Exhibit A is a printouts from my bookkeeping software detailing legal defense costs incurred in this matter. At all times relevant hereto my hourly rate has been \$200 per hour, which is the regular and ordinary billing rate charged all of my clients. I am generally familiar with the hourly rates of environmental attorneys practicing in Springfield, Illinois and before the Board, and believe this rate to be comparable, if not less, than other such attorneys.

4. The legal work involved in this appeal was customary to other appeals, with the

exception that there was more testimony, requiring more witness and hearing preparation. In reviewing the bills, the only entries that may require explanation are two involving Board decisions issued during the pendency of this appeal (July 25, 2016 and September 23, 2016), for which I wrote e-mails regarding their potential applicability. Both Board decisions were cited in my post-hearing briefs.

6. Exhibit A identifies the legal work performed and the attorney's fees incurred in this matter. It reveals the date the work was performed, the description of the work performed, the amount of time spent, and the total fees incurred. Filing fees, postage and photocopying charges are also identified.

7. The legal defense costs incurred in seeking payment for corrective action herein total \$13,519.37, consisting of \$13,440.00 in attorney-time, and \$79.37 in costs.

FURTHER AFFIANT SAYETH NOT.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Patrick D. Shaw

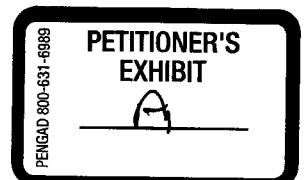
Law Office of Patrick D. Shaw
 80 Bellerive Road
 Springfield, IL 62704

Invoice submitted to:
 CW3M Company
 701 South Grand West
 Springfield IL 62704

January 17, 2017

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
5/26/2016 Receive & review denial letter w/ request to discuss appealing Abel	0.30 200.00/hr	60.00
5/27/2016 E-mail client regarding appealing; receive & review comments; tel conf. w/ client; begin drafting petition for review Abel	4.00 200.00/hr	800.00
5/29/2016 Revise petition and e-mail to client for review Abel	1.30 200.00/hr	260.00
6/1/2016 Review Stage 2 application Abel	0.30 200.00/hr	60.00
6/2/2016 Tel conf. w/ client; revise and file petition for review Abel	2.30 200.00/hr	460.00
6/20/2016 Tel conf. w/ client regarding strategy & Hrg Officer request for hearing or waiver; e-mail Webb and Richardson; tel Webb re waiver; receive Hrg Officer order Abel	1.00 200.00/hr	200.00
Receive & review Board order accepting petition for hearing Abel	0.10 200.00/hr	20.00
6/24/2016 Draft and file waiver of decision deadline Abel	0.20 200.00/hr	40.00
7/13/2016 E-mail to client regarding Agency position / arguments in recent hearing that relate to Abel; receive response; e-mail reply Abel	0.50 200.00/hr	100.00



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	<u>Hrs/Rate</u>	<u>Amount</u>
7/18/2016 Telephone status conference w/ Hrg Officer and attorneys Abel	0.30 200.00/hr	60.00
7/21/2016 Receive & review Hrg Officer Order Abel	0.10 200.00/hr	20.00
Tel conf. w/ consultant regarding upcoming hrg Abel	1.20 200.00/hr	240.00
7/22/2016 E-mail copy of Agency record w/ comments to client; e-mail resp. Abel	0.30 200.00/hr	60.00
7/25/2016 Review recent Board decision in Friends of the Environment and e-mail client comments Abel	0.50 200.00/hr	100.00
9/2/2016 Conference w/ consultants to prepare testimony for hrg Abel	4.00 200.00/hr	800.00
9/6/2016 E-mail to Jarvis regarding hearing; review record; prepare hearing outline and identify exhibits; e-mail to client re status of hrg prep Abel	3.90 200.00/hr	780.00
9/7/2016 Appearance for Hearing; Meeting with consultants following hrgI receive & review Hrg Report Abel	2.70 200.00/hr	540.00
9/12/2016 Draft waiver of decision deadline Abel	0.10 200.00/hr	20.00
9/21/2016 E-mail client copy of transcript w/comments Abel	0.20 200.00/hr	40.00
9/23/2016 E-mail recent Board decision in Knapp to client and discuss applicability of indirect cost ruling to current appeal; receive & review response; e-mail reply Abel	0.30 200.00/hr	60.00
9/26/2016 Draft Brief Abel	3.00 200.00/hr	600.00
9/27/2016 Draft brief Abel	3.50 200.00/hr	700.00
9/28/2016 Draft brief Abel	4.50 200.00/hr	900.00
9/29/2016 Draft brief; e-mail draft copy to client for review Abel	5.50 200.00/hr	1,100.00
9/30/2016 Telephone client; revise and file brief Abel	6.60 200.00/hr	1,320.00

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	<u>Hrs/Rate</u>	<u>Amount</u>
10/18/2016 Receive and review Agency's response brief; e-mail to client w/ comments Abel	0.30 200.00/hr	60.00
10/24/2016 Research and draft reply brief; e-mail to client re measuring wheel rental issue Abel	5.70 200.00/hr	1,140.00
10/25/2016 Draft reply brief Abel	4.50 200.00/hr	900.00
10/26/2016 Revise and file reply brief; tel conf. w/ client; receive e-mail from Hrg Officer requesting deadline extension; e-mail reply Abel	4.90 200.00/hr	980.00
11/14/2016 Draft and file waiver of decision deadline Abel	0.10 200.00/hr	20.00
12/16/2016 Receive & review Board order; e-mail to client Abel	1.00 200.00/hr	200.00
12/20/2016 Tel client re decision Abel	0.80 200.00/hr	160.00
1/17/2017 Review bills; draft and file petition for attorney fees and affidavit Abel	3.20 200.00/hr	640.00
For professional services rendered	<u>67.20</u>	<u>\$13,440.00</u>
Additional Charges :		
6/2/2016 Postage for June 2, 2016		1.57
Copying cost for June 2, 2016		2.80
Pollution Control Board filing fee		75.00
Total additional charges		<u>\$79.37</u>